



No. 1310

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

DEPARTMENT OF CONSERVATION OF THE STATE OF LOUISIANA,
AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF
LOUISIANA, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

**BRIEF OF THE STATE OF TENNESSEE IN OPPOSITION
TO PETITION FOR CERTIORARI.**

WILLIAM F. BARRY,
Solicitor General of Tennessee.



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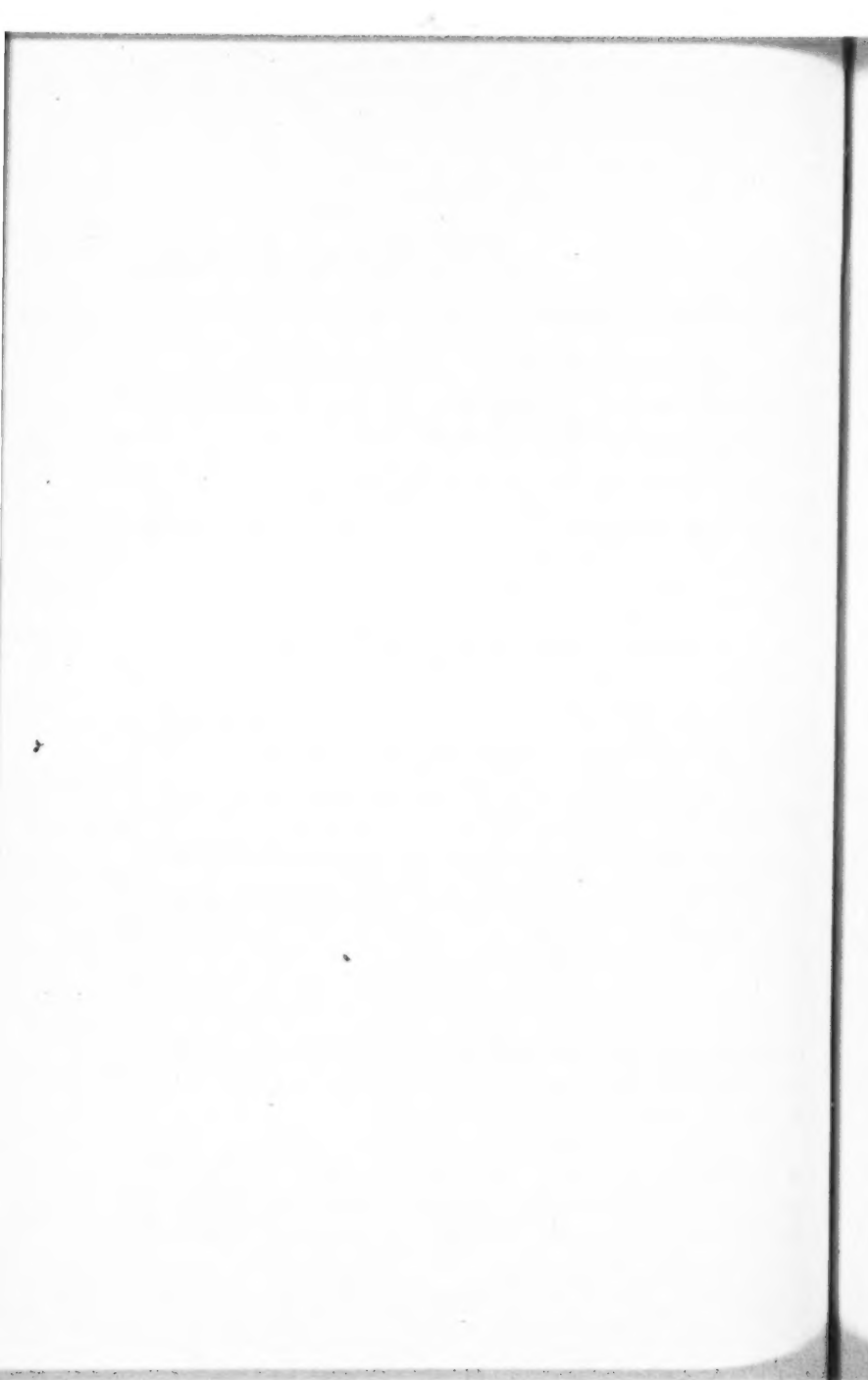
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FEDERAL POWER COMMISSION, *Respondent*.

BRIEF OF THE STATE OF TENNESSEE IN OPPOSITION TO PETITION FOR CERTIORARI.

May It Please the Court:

The State of Tennessee, acting through its Governor and Attorney General, was expressly permitted by the Federal Power Commission to intervene in the proceeding before said Commission wherein the Memphis Natural Gas Company was seeking certificates of convenience and necessity to install additional facilities to transport natural gas from the State of Louisiana to the City of Memphis, Tennessee, and to other municipalities and counties located in the Western section of Tennessee.

The State of Tennessee has a vital and material interest in the issues before the Court by reason of the fact that the Federal Power Commission by its opinion No. 119, "In the Matters of Memphis Natural Gas Company, Docket No.

G-522 and G-549," has granted certificates of convenience and necessity under which the citizens of many counties and cities in Western Tennessee will be assured of an additional supply of natural gas adequate and sufficient to meet their needs. For these reasons the State of Tennessee respectfully urges this Honorable Court to deny the petition for a writ of certiorari in this cause.

I.

THE FACTS WITH RESPECT TO PETITIONERS' REAL POSITION.

The petitioners, the Department of Conservation of the State of Louisiana, and The Public Service Commission of the State of Louisiana, undoubtedly represent the position of the State of Louisiana, and in presenting our factual statement, for the sake of brevity, we shall simply refer to the diverse interests and contentions of "Louisiana" and of "Tennessee."

It is admittedly the purpose of Louisiana to set aside the action of the Federal Power Commission in permitting the construction of the additional facilities by the Memphis Natural Gas Company and the withdrawal of the additional natural gas from the natural gas reserves in Louisiana. It is undoubtedly the further purpose of Louisiana to prohibit the transportation of additional quantities of its natural gas in interstate commerce to be used in Tennessee or other states. It is the further purpose of Louisiana to retain such gas within the producing state to be used in substantially the same manner as it is presently used in the importing states, all of which is to the economic benefit of Louisiana and to the severe detriment and injury of importing states.

The foregoing statement may appear to the Court as being a broad and serious charge as to the position taken by Louisiana, and for this reason we desire to quote verbatim from the testimony of Louisiana's witnesses before

the Federal Power Commission, to the end that the position of the State of Louisiana will be clearly before the Court in the language of its own witnesses. The record shows the following testimony of Louisiana's witnesses:

Testimony of H. W. Bell.

"Q. Now, Doctor, with reference to the use of natural gas in the State of Louisiana, I will ask you if it isn't used indiscriminately in that State under boilers in industry and in household use, in substantially the same manner as it is used in Memphis, Tennessee?"

"A. Yes, sir."

Appendix A to Brief, Memphis Natural Gas Co.,
(C.C.A.), p. 176.

"Q. Now, is that conservation based on a desire on the part of the State of Louisiana to conserve gas for use in the State of Louisiana, or to conserve it for use nationally, throughout the nation?"

"A. For use in the State of Louisiana.

"Q. To the exclusion of use in other States?"

"A. That is right."

Appendix A to Brief, Memphis Natural Gas Co.,
(C.C.A.), p. 177.

"Q. If you know the answer to this question, please give it; Is it the policy of the State of Louisiana to encourage industries from other States to come to Louisiana, on the basis that they may be able to find natural gas available to them there for their use in the manufacture of whatever commodity they prefer?"

"A. Yes, sir.

"Q. Has there been any campaign carried on by the State in that respect?"

"A. Yes, sir.

"Q. For what period of time, do you know?"

"A. Oh, I don't know as I can tell you exactly. Perhaps for 10 years, or such matter.

"Q. Is it still going on?"

"A. I believe it is.

"Q. At least, it is insofar as you know?"

"A. Yes, sir."

Appendix A to Brief, Memphis Natural Gas Co.,
(C.C.A.), p. 182.

"Q. Hasn't the use of natural gas, and its availability, been held out as an inducement for manufacturers to locate in the State of Louisiana?

"A. Of course, I never was in on any of those operations or deals, you might say. That has been handled, I believe, by the Department of Commerce and Industry—

Trial Examiner: (Interposing) It seems to me that you are asking the witness for something that he doesn't know anything about.

"Mr. Brunner: I am not so sure that he doesn't.

"By Mr. Brunner:

"Q. Isn't it a matter of public knowledge that the State of Louisiana has held out their natural resources, natural gas, to be available to manufacturers in other parts of the country as an inducement to come to the State of Louisiana?

"A. I think that is largely true."

Appendix A to Brief, Memphis Natural Gas Co.,
(C.C.A.), p. 183.

"Q. Mr. Bell, from your connection with the Conservation Department, is it not a fact that any industry in the State of Louisiana is permitted to burn as much gas under boilers for steam generation as it desires?

A. Well, I think so. First, of course, they have to find the source of their gas. That doesn't mean that any one gas well would be allowed to produce as much as they want to burn, they may have to get it from five or six gas wells. I want to make that point clear. A gas well is not produced excessively to allow any one plant to get all the gas it wishes. If they find the market, I mean if they find the source, that is true.

"Q. Take an industry located in Baton Rouge, there is no limitation on how much they can burn under a steam boiler at Baton Rouge, is there?

"A. There is no rule set up, but there are some companies that haven't been able to find the gas that they think they need to use, on account of lack of pipelines.

"Q. If they can find the gas, they can use it, that is the point?

"A. That is about it.

"Q. In the State of Louisiana?

"A. Yes.

Appendix A to Brief, Memphis Natural Gas Co.,
(C.C.A.), p. 184-185.

"Q. Do you have a classification for the use of natural gas for the generation of electric energy?

"A. No, sir.

"Q. You don't compile any statistics showing that separately?

"A. No, sir.

"Q. Is it or is it not a fact that natural gas is used within the State of Louisiana rather extensively for that purpose?

"A. Well, it is to a considerable extent.

"Q. Approximately 35 billion cubic feet per year being used for that purpose?

"A. I really don't know, Mr. May, what the figure would be.

"Q. In any event, there has been no restriction placed by the State of Louisiana on the use of natural gas for boiler fuel purposes or for any other purpose, is that correct?

"A. Except on carbon black, possibly.

Appendix A to Brief, Memphis Natural Gas Co.,
(C.C.A.), p. 185-186.

Testimony of Governor Jimmie H. Davis.

"Q. As I take it, Governor, the paper that you just read into the record expresses your policy as the chief executive of the State of Louisiana, is that correct?

"A. That is right.

"Q. I noticed throughout the entire paper that you used the word, on many occasions, 'exporting' natural gas. Do I correctly understand your position to be that your objection in this particular case is because of the fact that this gas will be exported from the State of Louisiana?

"A. Well, that is the objection."

Appendix A to Brief, Memphis Natural Gas Co.,
(C.C.A.), pp. 186-187.

"Q. Let me ask you this: Is it the policy of the State of Louisiana that gas should be used within the State without limit, but should not be exported from that State?

"A. I might answer that by saying that we have no other fuel, and that is our gas, and it is there. I have never had anything to say about what they use in Michigan.

"Q. In other words, you want to keep our gas for us home folks, don't you?

"A. Well, I would like for you to have a big say-so in it.

"Q. And you would like to keep it for us within the State for any purpose that any consumer might desire to burn it for?

"A. Well, since we have no other fuel, but even within our own State, as I said in my statement, we have begun to realize that it is passing away, and there is going to be a time when we will have no more, even ourselves."

Appendix A to Brief, Memphis Natural Gas Co.,
(C.C.A.), p. 187.

"Q. I would like to ask the Governor if it is his position that natural gas, being an exhaustible natural resource, can be retained in the State by action of the State, or should be retained in the State by action of the State, I will put it that way, simply because it is an exhaustible natural resource?

"A. Yes, and because we have no other fuel.

"Q. Would it not be true that each State would be similarly affected, with exhaustible resources within that State, such as phosphate within Tennessee, or sulphur in Louisiana, which you mentioned in your paper, or coal in Kentucky or West Virginia—wouldn't that be true?

"A. Well, if it got to the point where people had to go, so to speak, cold and hungry, due to a shortage of such products, I would say yes.

"Q. If some of the States adopted the same policy with reference to their exhaustible natural resources, would that not create a very definite barrier between the States?

"A. Well, I said in my statement that we didn't seriously object to helping people who had no other fuel, but when you use the gas that we have here, which could be used for superior uses, when you use it for everything when the gas is fast passing away, that is the reason for our objection.

"Q. Is it a part of your position that the retention of that gas in Louisiana would tend to increase the economic development in your State?

"A. Yes, it would. That is the main thing we have to offer.

"Q. Then a part of the position of the State of Louisiana is what might be termed selfish?

"A. No, it is just self-preservation, because if you recall the last few words of my statement, it goes back to the superior uses of gas, and I said in the paper that it was not a case of selfishness.

"Q. The Examiner has ruled out the uses of gas, at least that was my understanding of the preliminary announcement of the Chief Examiner, so that will be all.

"A. I can tell you very frankly that if I thought that Tennessee had gas that would be gone in some twenty or twenty-five years, I wouldn't have the heart to ask them for that gas.

Appendix A to Brief, Memphis Natural Gas Co.,
(C.C.A.), p. 187-189.

"Q. Governor, you of course are here representing the State, which is opposing the granting of the two applications pending before the Commission. That is correct, is it not?

"A. Yes.

"Q. Now it has developed in the hearing that one of these applications is for the construction of a 20" line from Monroe to Lisbon, which will connect with the system of the United Gas Pipe Line Company, and that gas will be purchased from the United Gas Pipe Line Company, part of which will be produced and brought in from the State of Texas. To the extent that this project involves the purchase and acquisition of gas which might be produced in Texas, you have no objection to that, have you?

"A. Of course I can't answer for Texas.

"Q. I say you.

"A. If it involves Louisiana, if it is a joint deal, then I am opposed to anything that effects a shortage of gas in Louisiana, if that answers your question.

"Q. My question was—does the State, represented by you, have any objection to the construction of facil-

ities to be utilized for the importation of gas from Texas into Louisiana?

"A. Will you ask that question again?

"Trial Examiner: Will the Reporter read it back?

"(The Reporter read the pending question.)

"The Witness: Into Louisiana for what purpose?

"By Mr. Shotwell:

"Q. For the purpose of this project that we are now discussing.

"A. I suppose if Texas wants to pipe it through there that that is the business of Texas.

"Q. My question was—do you as a representative of the State of Louisiana object to that?

"A. Well, so long as it does not affect our State, or the shortage of gas in our State, we have no objection, because I know the predicament that we are in."

Appendix A to Brief, Memphis Natural Gas Co.,
(C.C.A.), p. 189-190.

It is the position of the State of Tennessee that from the foregoing testimony of Louisiana's witnesses that there can be but one interpretation placed upon such testimony and but one conclusion drawn therefrom, namely, that Louisiana proposes to keep for itself and for its own benefit as much of the natural gas produced in the State as possible, to withhold the gas from the channels of interstate commerce and use it for the economic advancement and development of the State of Louisiana at the expense, inconvenience and economic detriment of other states which have been importing such natural gas in interstate commerce over a period of years.

The position taken by petitioners would result in an unlawful discrimination against the State of Tennessee and its citizens. It is undisputed that for the past seventeen years the natural gas distribution systems in West Tennessee have been purchasing natural gas from the Memphis Natural Gas Company and supplying the same to the large City of Memphis, Tennessee and various other smaller cities situated in West Tennessee. The exact scope of the development of this industry and the vast invest-

ment by the citizens of the State of Tennessee are set out in the opinions of the Federal Power Commission and the Circuit Court of Appeals for the Fifth Circuit. It is not necessary to again present those figures here, but it is sufficient to say that the people of the area affected cannot lawfully be discriminated against in their health, comfort, convenience and investment, and the State of Louisiana or the other states purchasing natural gas from Louisiana benefited thereby.

II.

BRIEF AND ARGUMENT.

At the present time there is no Act or statute in Louisiana restricting the exportation of natural gas from the State of Louisiana. From an examination of the Natural Gas Act (52 Stat. 833; Title 15 U. S. C. 717-717W), there is no provision restricting the transportation or removal of natural gas from the state where such gas is taken from the earth to another state where the same is consumed domestically, commercially or industrially. The State of Tennessee takes the position that, under the commerce clause of the Federal Constitution, such an Act, if passed by the State of Louisiana or any other state, would be unconstitutional and void and any state officer endeavoring to enforce a statute forbidding the transportation of gas to points outside of the state could be enjoined by the Federal Courts.

The positions taken by the State of Louisiana and the State of Tennessee in the instant proceeding are substantially similar to the issues decided by this honorable Court in *Pennsylvania v. West Virginia* and *Ohio v. West Virginia*, 262 U. S. 553, 67 L. ed. 1117. In that case the Court said:

“Another consideration advanced to the same end is that the gas is a natural product of the State and has become a necessity therein, that the supply is wan-

ing and no longer sufficient to satisfy local needs and to be used abroad, and that the Act is therefore a legitimate measure of conservation in the interest of the people of the State. If the situation be as stated, it affords no ground for the assumption by the State of power to regulate interstate commerce, which is what the Act attempts to do." (p. 598.)

"By the Constitution, art. 1, sec. 8, cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws, and to insure uniformity in regulation. * * * All the states have assented to it, all are alike bound by it, and all are equally protected by it." (p. 596.)

Also see:

Missouri v. Kansas Natural Gas Co., 265 U. S. 298, 68 L. ed. 1027.

Foster-Fountain Packing Co., et al v. Haydel, 278 U. S. 1, 74 L. ed. 147.

It has been uniformly held that natural gas, when reduced to possession by the owner of the surface, is an article of commerce and the Congress has expressly so recognized it, and provided for its transmission or transportation by pipe lines.

West v. Kansas Natural Gas Co., 221 U. S. 229, 55 L. ed. 716;

Haskell v. Kansas Natural Gas Co., 224 U. S. 217, 56 L. ed. 738.

The State of Tennessee submits that the foregoing authorities definitely fix the character of natural gas as a proper article in commerce and it necessarily follows that the regulation of this transportation will be determined by Congress.

Upon this point this Court in the case of *Federal Power Commission, et al v. Hope Natural Gas Company*, 320 U. S.

591 (Jan. 1944), (which was a rate case), stated the following on pp. 612 and 613, relative to the construction of the Natural Gas Act:

"We do not mean to suggest that Congress was unmindful of the interests of the producing states in their natural gas supplies when it drafted the Natural Gas Act. As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over 'the production or gathering of natural gas.' Sec. 1 (b). In addition, Congress recognized the legitimate interests of the States in the conservation of natural gas. By Sec. 11 Congress instructed the Commission to make reports on compacts between two or more States dealing with the conservation, production and transportation of natural gas. The Commission was also directed to recommend further legislation appropriate or necessary to carry out any proposed compact and 'to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable and economic production, transportation, and distribution of natural gas.' Sec. 11 (a). Thus Congress was quite aware of the interests of the producing states in their natural gas supplies. * * *"

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. pp. 612-613.

In the same opinion of the Court, on pp. 617 and 618, the Court made the following pertinent statement:

"Congress has entrusted the administration of the Act to the Commission, not to the courts. Apart from the requirements of judicial review it is not for us to advise the Commission how to discharge its functions."

Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 617-618.

In the separate opinion of Mr. Justice Jackson, in the same case, 320 U. S. p. 660, it is stated:

"Whether the Commission will assert its apparently broad statutory authorization over prices and discrimi-

nations is, of course, its own affair, not ours. It is entitled to its own notion of the 'public interest' and its judgment of policy must prevail. * * *."

Counsel for the State of Tennessee again points out that this Court was dealing with the question of rates in *Federal Power Commission v. Hope Natural Gas Company*, supra, but during the course of the opinion took occasion to discuss the matter of conservation and the broad powers granted by Congress to the Federal Power Commission. Undoubtedly, under the terms of the Natural Gas Act, it is within the power of the Commission to recommend to Congress additional legislation relative to conservation of natural gas and, as stated by the Court, "to aid in the conservation of natural resources within the United States and in the orderly, equitable and economic production, transportation and distribution of natural gas", as quoted by the Court in the *Hope* case.

It is, of course, entirely within the province of any state to enact non-discriminatory legislation for the conservation of its exhaustible natural resources. If in the present litigation the State of Louisiana was concerned with the enforcement of some valid non-discriminatory conservation statute, the State of Tennessee would not and could not have any valid legal objection. On the contrary, however, the petitioners are seeking to effect inequitable, unjust and discriminatory distribution of natural gas, to the prejudice of interstate commerce, after the same has been lawfully produced under the laws of the State of Louisiana and has become a lawful article of commerce.

Such being the true circumstances, there can be no merit in the petition and the same should be denied.

Respectfully submitted,

WILLIAM F. BARRY,
Solicitor General of Tennessee.

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Supreme Court of the State of Louisiana

ORIGINAL CASE NO. 100

DEPARTMENT OF CONSERVATION OF THE STATE OF LOUISIANA
AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF
LOUISIANA, Petitioners

FEDERAL POWER COMMISSION, Respondent

BRIEF ON BEHALF OF MEMPHIS NATURAL GAS
COMPANY AND MEMPHIS LIGHT AND WATER
DIVISION OF THE CITY OF MEMPHIS IN OPPO-
SITION TO THE PETITION OF THE DEPARTMENT OF
CONSERVATION AND THE PUBLIC SERVICE COMMISSION

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COMPANY AND MEMPHIS LIGHT, GAS AND WATER
DIVISION OF THE CITY OF MEMPHIS IN OPPOSI-
TION TO THE PETITION FOR WRIT OF CERTIORARI**

May it please the Court:

Memphis Natural Gas Company and Memphis Light, Gas and Water Division of the City of Memphis, while not designated in the caption as Respondents, are not only Respondents but are the real parties in interest.

Memphis Natural Gas Company (hereinafter referred to as Pipeline Company) is an interstate pipeline company, and initiated these proceedings by its application for a

certificate of public convenience and necessity to the Federal Power Commission for the purpose of augmenting its facilities so as to supply additional natural gas to meet the needs and demands of its existing city-gate customers, the principal customer being the City of Memphis, Tennessee.

Memphis Light, Gas and Water Division (hereinafter referred to as Division) is a municipal agency and operates the municipally owned utility system for the distribution and sale of natural gas to consumers in the City of Memphis and in Shelby County, Tennessee. The Division purchases its supply of gas exclusively from the Pipeline Company, and Division's requirements constitute more than 80 per cent of the sales of Pipeline Company. It was primarily Division's needs and insistence that caused Pipeline Company to apply to Federal Power Commission for certificates of public convenience and necessity to construct additional facilities to augment its deliverable volume of gas.

Division intervened in the proceedings before the Federal Power Commission, and both Division and Pipeline Company were parties in the proceeding in the Circuit Court of Appeals wherein the Petitioners unsuccessfully sought to set aside the opinion and order of the Commission.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R.59) is not yet officially reported. The Opinion No. 119 of the Federal Power Commission and the order thereon entered on November 21, 1944, granting the certificates of public convenience and necessity are not yet officially reported and appear in the Record in Appendix to Brief of Federal Power Commission (C.C.A.) pp. 9-32.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 31, 1945 (R.67). Petition for rehearing was filed, and was denied on April 18, 1945 (R.81). Peti-

tion for writ of certiorari was filed on May 25, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 19(b) of the Natural Gas Act.

STATUTES.

The only statute pertinent is the Natural Gas Act (15 U. S. C. Sec. 717-717w), the pertinent provisions of which are Section (7e) governing the issuance of certificates and Section 19(b) regulating the right of judicial review.

Section 7(e) provides:

" * * * a certificate shall be issued to any qualified applicant therefor, * * * if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, * * * is or will be required by the present or future public convenience and necessity; * * * "

Section 19(b) provides:

"Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals * * *. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

QUESTION PRESENTED.

Initially, it is submitted that the petition for writ of certiorari should be denied on the ground that Petitioners have failed to comply with Rules 27 and 38 of this Court, in that (1) Petitioners have not concisely stated what ques-

tions are presented, and have set forth no less than 28 numbered questions, and their statement of the questions presented is inaccurate, repetitious and confusing, and (2) the assigned errors intended to be urged are not properly expressed.

Since Petitioners have failed to state clearly and concisely the real questions presented, we know of no better manner of setting forth the real questions involved than by quoting the Circuit Court of Appeals' summary of Petitioners' contentions:

"They [Petitioners] base their whole case on reading the words 'public convenience and necessity' as including considerations of conservation of natural gas with a consequent prohibition against the issuing of certificates where, as here, there is protest and proof by a state that the gas to be withdrawn under the authority of the certificate will be put to an economically wasteful use, that is to the inferior one of being burned under boilers. Pointing to the evidence of the already highly developed industrial use of the gas, and the evident purpose to extend and increase that use, petitioners insist that this sustains its burden of showing that the finding of fact by the commission, that the issuance of the certificate will be required by the present or future public convenience and necessity, is not supported by substantial evidence." (R. 63.)

HOW FEDERAL POWER COMMISSION AND CIRCUIT COURT OF APPEALS CONSIDERED AND DECIDED THE QUESTIONS PRESENTED.

Both the Federal Power Commission and the Circuit Court of Appeals maturely considered Petitioners' contentions, as clearly appears from their respective opinions. The opinion of the Federal Power Commission so clearly and concisely reviews the contentions and questions presented that we quote therefrom, as follows:

"The positions taken by the interveners are divergent. The principal contentions may be briefly

summarized as follows: The Memphis Light, Gas and Water Division of the City of Memphis, supported by the State of Tennessee, contends that Memphis is a rapidly growing community requiring additional volumes of natural gas for its population and its expanding industries; that unless the proposed facilities are installed it will be necessary on winter peak days to curtail or completely interrupt service to essential industries, commercial enterprises, and other customers having no standby-fuel equipment, thereby impairing the welfare and normal growth of Memphis; and that the unlooped portions of Applicant's main line constitute a hazard to service which should be alleviated by the installation of the proposed dual main lines.

"The Public Service Commission of Louisiana and the Department of Conservation of that State vigorously oppose the granting of the certificates. The contention is that while Louisiana has natural-gas resources, it is not endowed with local deposits or water power; that the remaining gas reserves in that State are approximately $8\frac{1}{2}$ trillion cubic feet; that such reserves are being withdrawn at the rate of some $\frac{1}{2}$ trillion cubic feet per year, indicating a remaining life on the basis of such withdrawals of about 17 years; and that such irreplaceable natural-gas resources should be conserved for use within Louisiana—not transported to distant markets outside the State for use by competing industries where other fuels are available.

"In opposition to the issuance of the certificates, the National Coal Association, United Mine Workers of America, and railroad labor unions argue that 88 percent of all gas sold in Memphis for industrial purposes and 76 percent of the volume sold for commercial purposes is used for boiler fuel; that the industrial and commercial customers of Mississippi Power & Light Company likewise consume in excess of 90 percent of their gas as boiler fuel; that in the interests of sound conservation coal should be used instead of natural gas for boiler fuel or other so-called inferior purposes; and that the public convenience and necessity do not require the granting of the certificates, because, if the

proposed facilities were not constructed, curtailments would need to be made only in service to consumers using gas for boiler-fuel purposes. No distinction is made, however, in this argument between boilers in power plants and large industries on the one hand, and boilers in small commercial establishments, office and apartment buildings, schools, hospitals, theaters and hotels on the other hand. It is conceded, moreover, that if the deliverability of the Monroe field is declining at the rate of 15 percent per year 'it will be necessary to obtain supplies from other fields in the comparatively near future.'

"In reply to the argument of the coal and labor interests, Applicant contends that if it were deprived of its boiler-fuel loads, increased rates to domestic and commercial users would inevitably result.

"The Railroad Commission of Texas and the Independent Natural Gas Association of America contend that the Natural Gas Act does not vest us with any authority over the end-uses of natural gas, and therefore, that we cannot lawfully give effect to such considerations in determining the issue of public convenience and necessity. In sharp contrast to the position of Louisiana, the Texas Commission desires that no Federal restrictions whatever be imposed on the exportation of natural gas from Texas.¹²

"The State of Tennessee contends that the attitude of Louisiana in this proceeding is 'discriminatory' against Tennessee, since large quantities of gas are now being exported from Louisiana to other States, including Texas, Arkansas, Mississippi, Missouri, Illinois, Alabama, Georgia, and Florida, without restrictions.

"Additionally, it is noted that a representative of numerous land and royalty owners in the Lisbon gas field has urged that the applications be granted, stat-

¹² Counsel for the Texas Commission stated:

"We are great marketers of natural gas in Texas and we feel that the better the market, the larger the market, the better the price, and the better the price, the easier it is to prevent physical waste of natural gas, because then you have landowners and everyone else undertaking to prevent waste and hold it down."

ing that the proposed Lisbon line would furnish the only dependable outlet for the sale of their gas.

"These conflicting contentions have been given our careful consideration. We have been keenly aware of the necessity of finding a satisfactory solution to the many perplexing problems thus posed, not only in these proceedings, but also in other cases arising under Section 7 of the Natural Gas Act. In our 1940 Annual Report to Congress (at pp. 79-80), we directed attention to the growing importance of certain of these problems and suggested the necessity for further investigation and additional legislation. The Committee on Interstate and Foreign Commerce of the House of Representatives, in its report on H. R. 5249, a bill to amend Section 7 of the Natural Gas Act (H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 4-5), deleted certain portions of the proposed bill, stating that:

'The increasingly important problems raised by the desire of several States to regulate the use of the natural gas produced therein in the interest of consumers within such States, as against the Federal power to regulate interstate commerce in the interest of both interstate and intrastate consumers, are deemed by the committee to warrant further intensive study and probably a more detailed and comprehensive plan for the handling thereof than that which would have been provided by the stricken subsection.'

"These events, coupled with the growing intensity of the conflict between opposing interests in certificate cases coming before us under Section 7 of the Act, led to our adoption, on September 22, 1944, of an order in Docket No. G-580 instituting a comprehensive investigation of the entire problem. The Governors and regulatory and conservation commissions of each of the States, the Interstate Oil Compact Commission, the natural-gas industry, the coal, railroad and labor organizations, and other interested parties have been invited to file statements of their views and suggestions concerning the matters to be covered in such investigation and the procedure which should be followed. Hearings are to be held as soon as prac-

ticable, at which all interested persons will be given full opportunity to present their views.

"At the outset of the rehearing, it was announced that the Commission would institute the general investigation, above referred to, and counsel, were invited to cooperate in confining the hearing to the facts substantially and immediately affecting the pending applications. The instant proceedings are necessarily limited to the issues raised by such applications and must be decided on the record before us. It is apparent that we did not undertake in these proceedings the broad investigation instituted by our order entered in Docket No. G-580.

"This proceeding does not involve the construction of a pipe line to provide service to new market areas. The evidence shows that the proposed facilities are required for the rendition of adequate service to Applicant's present customers in its existing markets. When completed, such facilities will not permit Applicant to serve more than an additional 21,000 Mcf per day to its customers. Moreover, Applicant is now obtaining its natural-gas supplies from the Monroe field from which large volumes of natural gas are being transported to markets outside of Louisiana. Applicant proposes initially to obtain its additional natural-gas supplies from the Lisbon field, the entire output of which, substantially, is now being exported from Louisiana, and will continue to be exported under existing contracts whether or not these applications are granted. The total additional gas to be sold by Applicant constitutes only about 1.3 percent of the total natural-gas production of Louisiana marketed in the year 1942. Furthermore, the agreement between Applicant and United contemplates that within a few years a sizable proportion of Applicant's additional gas supplies will come from Texas.

"While we are not unsympathetic with the effort of the producing State of Louisiana to protect and conserve its natural gas resources for the benefit of its citizens, it is apparent that denial of Applicant's request for these certificates will not afford the State of Louisiana a satisfactory solution of the problem posed by it. Such problem cannot be determined within the limits of these proceedings. It is reasonable, however,

to condition the certificates so that the facilities herein authorized shall not be used for the transportation or sale of natural gas to any new customers of either Applicant or United except upon specific authorization by this Commission."

Record, Appendix to Brief of Federal Power Commission (C.C.A.) pp. 23-28.

The Circuit Court of Appeals not only found that the opinion and order of the Federal Power Commission were supported by substantial evidence, but further reviewed and rejected Petitioners' contentions, as follows:

"Throughout the argument and briefs it has been contended, not so much on the part of the commission as on the part of those aligned with it, that the case in the end comes down to this, that Louisiana, under the guise of conservation against waste, is trying to monopolize for use in Louisiana, the gas the state produces, and it is urged upon authority that this can not be done. The petitioners deny that they are trying to prevent proper movement of gas in interstate commerce. They insist that all that they are doing is to present evidence that the use to which the gas will be put under the certificates is a most inferior one, and that this being undisputed, the commission, as matter of law, could not grant the certificates and we must set them aside. * * * Viewing petitioners' contention in the light most favorable to them, the best that can be said upon this record for petitioners is that they made an issue upon whether the fact that some of the gas to be taken under the certificates will be put to inferior uses was sufficient to cause a denial of the certificates. The commission thoughtfully and sympathetically considered the evidence tendered and determined that certificates qualified as they were qualified should issue. In so doing, it exercised the power of judgment confined to it and not to the courts." (R.66).

STATEMENT OF THE CASE.

The nature of the questions presented makes it unnecessary to set forth an extended review of the case, but the Circuit Court of Appeals' statement of the case is so clear and concise that we are quoting therefrom, as follows:

"Beginning its operations as an interstate pipe line company in 1928, its system consisted of an 18-inch pipe line extending from the Monroe, Louisiana, gas field through the States of Arkansas, Mississippi, and to Memphis, Tenn. For the past seventeen years it has supplied natural gas to various city gas utility distributing companies, in the States of Arkansas, Mississippi, and Tennessee, the principal customer being the City of Memphis Tennessee.

"In 1940, it began a construction program of a loop line paralleling its original 18-inch pipe line from the Monroe field to Memphis. The proposed plan was to loop completely this line over a period of years. The purpose of the construction program was to provide pipe line capacity to meet the increased demands of its city gas customers.

"In 1940, 92 miles of the looping were completed; in 1941, an additional 55 miles were constructed; in 1942, and also in 1943, the company attempted to complete the loop line construction, but, due to war emergency conditions, the materials and priority assistances were unavailable, and it was not until December, 1943, that the War Production Board granted approval and permit to construct the balance of the loop line.

"In connection with the construction of the lines in 1940 and 1941, it was not necessary for the company to obtain a certificate from the Federal Power Commission. However, Section 7 of the Natural Gas Act was amended as of Feb. 7, 1942, and it became necessary for the company to obtain from the Federal Power Commission a certificate of public convenience and necessity to construct the balance of the loop line.

"On Jan. 31, 1944, it filed with the Federal Power Commission its application for a certificate of public convenience and necessity for the construction and operation of 62.5 miles of loop lines. Intervening in this proceeding were the State of Tennessee, the Memphis Light, Gas & Water Division of the City of Memphis, Tennessee, and The Independent Natural Gas Association of America, supporting the application, and the Public Service Commission of Louisiana, the Department of Conservation of the State of Louisiana, and the National Coal Association, the United

Mine Workers of America, the Order of Railway Conductors, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Engineers, and the Switchmen's Union of North America, opposing it.

"On May 20, 1944, the company filed with the Commission an application for a certificate of public convenience and necessity for the construction and operation of a gas transmission line from Guthrie, Louisiana, in the Monroe gas field to Lisbon gas field in Claiborne Parish, Louisiana.

"The same parties supporting and opposing the granting of the first certificate oppose this one also.

"On June 10, 1944, the Commission, stating in its opinion and order that a sufficient showing of adequate gas reserve had not been made, denied and dismissed without prejudice the application for the certificate in the looping project. A petition for rehearing, reconsideration and reversal of the Commission's order of June 10, 1944, was made and granted and an opportunity to present further evidence was provided.

"The two Dockets involving the certificates for the looping project and the Lisbon line were consolidated by order of the Commission, and a hearing in the consolidated causes began on September 7, and was concluded on Oct. 5, 1944. On Nov. 21, 1944, the Commission entered its Opinion and order, issuing certificates of public convenience and necessity for the construction and operation of both the loop line and the Lisbon line." (R. 59-61.)

Incidentally, we desire to state that Pipeline Company subsequently and timely filed with the Federal Power Commission all definitive contracts required by the Commission's opinion and order.

On March 31, 1945, the Circuit Court of Appeals rendered its opinion approving the order of the Federal Power Commission, and on April 18, 1945, denied the petition for rehearing.

On May 21, 1945, the Circuit Court of Appeals entered an order staying "the execution, effectiveness and oper-

ation" of the Federal Power Commission's opinion and order and the affirming opinion and decree of the Circuit Court of Appeals "pending final disposition of Petitioners' petition to the Supreme Court of the United States for a writ of certiorari."

The stay order was entered on ex parte application and without requiring Petitioners to give security for damages and costs, as provided in 28 U. S. C. Sec. 350.

ARGUMENT.

The petition does not present any important question of federal law which has not been but should be settled by this Court, and the issues arising under the petition are not national in their scope.

Although the contentions of the Petitioners are ostensibly based upon the grounds of conservation, the record clearly shows that their real motive is to prevent the exportation of gas in interstate commerce and thereby compel industry to locate in Louisiana. The record further shows that while Petitioners voice opposition to the exportation of gas for industrial use in other states, Louisiana permits and encourages the unlimited use of gas for industrial purposes in Louisiana. (Testimony, H. W. Bell, Appendix A to Brief of Memphis Natural Gas Company (C.C.A.), pp. 176-186; Testimony of Governor Jimmie H. Davis, Appendix A to Brief of Memphis Natural Gas Company (C.C.A.), pp. 186-190.)

To the extent that Louisiana is interested in the practice of conservation, its rights flow from state statutes and regulations which are in no wise impaired, limited or affected by the order of the Federal Power Commission involved herein. The record shows that the Department of Conservation of the State of Louisiana is and has been regulating the production of natural gas in the state without interference by the Federal Power Commission. (Testimony, H. W. Bell, Appendix A to Brief of Memphis Natural Gas Company (C.C.A.), pp. 177-179.)

Insofar as the questions raised by Petitioners are germane to this proceeding, they are matters which Congress has entrusted to the Federal Power Commission and, in the exercise of the discretion so vested in it, the Federal Power Commission has granted the certificates.

The language of the United States Supreme Court in the case of *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 612, 88 L. Ed. 276, is so pertinent that we quote therefrom as follows:

“Congress has entrusted the administration of the Act to the Commission, not to the courts. Apart from the requirements of judicial review it is not for us to advise the Commission how to discharge its functions.” (320 U. S. 617, 618)

In the dissenting opinion in the same case, the same interpretation of the Act is stated by Mr. Justice Jackson at page 660:

“It [Federal Power Commission] is entitled to its own notion of the ‘public interest’ and its judgment of policy must prevail * * * .”

The petition filed in this Honorable Court shows upon its face that the only justiciable issue presented by the petition is a mere dispute concerning the conclusion to be drawn from the proof. The order of the Commission sought to be reviewed in this Honorable Court rests not only upon the voluminous record of protracted hearings, but also upon the experience and expert knowledge of the members of the Commission in a highly specialized and complex field of administrative law. In the very Act from which the right of review arises, Congress has deemed it wise to entrust to the Commission the making of the findings of fact, and this Honorable Court is without jurisdiction or power to substitute its judgment on the evidence for the judgment of the Commission; and it necessarily follows that the petition for writ of certiorari is so wanting in

merit as to cause it to be frivolous and without any support whatever in reason, and obviously was filed only for delay.

No principle of law is now more firmly established than that the courts shall not encroach upon the power of special administrative agencies created by Congress, whose findings are made conclusive *where supported by evidence*, and that the courts can not substitute their judgment on disputed evidence for that of the administrative agency, and whether the courts would reach the same conclusion from conflicting evidence is immaterial.

Federal Power Commission v. Hope Natural Gas Co.,
320 U. S. 591, 88 L. Ed. 276, 290;

Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 86 L. Ed. 1037;

Public Utilities Commission v. United Fuel Gas Co.,
317 U. S. 456, 87 L. Ed. 396;

Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U. S. 498, 510, 86 L. Ed. 371, 378;

Rochester Telephone Corp. v. U. S., 307 U. S. 125, 128,
83 L. Ed. 1147, 1161;

Federal Trade Commission v. Pac. States Paper Trade Assn., 273 U. S. 52, 63, 71 L. Ed. 534;

Federal Trade Commission v. Algoma Lumber Co.,
291 U. S. 67, 73, 78 L. Ed. 655;

Dobson v. Comm. of Internal Rev. 320 U. S. 489, 88 L.
Ed. 179, 185-186;

N. L. R. B. v. Falk Corp., 308 U. S. 453, 461, 84 L. Ed.
396, 400;

Medo Photo Supply Corp. v. N. L. R. B., 321 U. S. 678,
88 L. Ed. 749, 750;

N. L. R. B. v. Nevada Consolidated Copper Corp., 316
U. S. 105, 86 L. Ed. 1305;

N. L. R. B. v. Link-Belt Co., 311 U. S. 584, 85 L. Ed.
368, 378;

N. L. R. B. v. Automotive Maintenance Machinery Co.,
315 U. S. 282, 86 L. Ed. 848;

N. L. R. B. v. Waterman Steamship Corp., 309 U. S.
206, 208-9, 226, 84 L. Ed. 704, 707, 716;

Swayne & Hoyt, Ltd. v. U. S. A., 300 U. S. 297, 81 L.
Ed. 659;

**DELAY IN DISPOSITION OF PETITION WILL BE
PREJUDICIAL TO PUBLIC INTEREST.**

Emergency of the Case.

The effectiveness of the order of the Federal Power Commission is stayed by order of the Circuit Court of Appeals pending a decision on the petition for a writ herein, and no security for damages has been required. A delay in considering the petition will result in an unfortunate interference with, and interruption of, the construction of the pipeline facilities which are so urgently needed by the consuming public in the City of Memphis and in other communities served by the Pipeline Company. The construction of these facilities must be completed before the coming winter in order to prevent serious suffering and hardship, and it can only be accomplished by the prompt commencement of construction work so as to take advantage of the favorable weather during the summer months.

The importance of the proposed facilities and the urgency for their prompt construction are further indicated by the following telegram of the War Production Board introduced at the hearing before the Federal Power Commission:

**"WAR PRODUCTION BOARD
OFFICE OF WAR UTILITIES**

September 8, 1944

**FEDERAL POWER COMMISSION
ROOM 339 FEDERAL BUILDING
MEMPHIS, TENNESSEE**

**PROPOSED CONSTRUCTION FOR WHICH
MEMPHIS NATURAL GAS COMPANY IS RE-
QUESTING CERTIFICATE OF CONVENIENCE
AND NECESSITY AT HEARING NOW BEING
CONDUCTED IS CONSIDERED BY OFFICE OF
WAR UTILITIES TO BE A PROJECT OF MAJOR
IMPORTANCE. CAREFUL CONSIDERATION
WAS GIVEN TO THIS PROBLEM BEFORE PRI-
ORITY ASSISTANCE WAS GRANTED. HIGH**

PEAK DAY REQUIREMENTS ENTERED INTO CONCLUSIONS. IN ORDER TO MAINTAIN PROPER SUPPLY OF GAS FOR WAR PRODUCTION AND CIVILIAN REQUIREMENTS IN AREAS SERVED BY THIS COMPANY, PARTICULARLY THE GREATER MEMPHIS AREA, WE URGE FAVORABLE CONSIDERATION OF THIS COMPANY'S APPLICATION.

/s/ EDWARD FALCK
WPB, UTILITIES''

Appendix A to Brief of Memphis Natural Gas Co.
(C.C.A.) p. 119.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 1, 1945.

